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IN THE  
**Supreme Court of the United States**  
October Term, 1992

CHURCH OF THE LUKUMI BABALU AYE, INC.,

—and—

ERNESTO PICHARDO,

*Petitioners,*

—against—

CITY OF HIALEAH, FLORIDA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**BRIEF AMICUS CURIAE OF INTERNATIONAL SOCIETY FOR  
ANIMAL RIGHTS, CITIZENS FOR ANIMALS, FARM ANIMAL  
REFORM MOVEMENT, IN DEFENSE OF ANIMALS, PER-  
FORMING ANIMAL WELFARE SOCIETY, and STUDENT  
ACTION CORPS FOR ANIMALS, IN SUPPORT OF RESPONDENT  
CITY OF HIALEAH, FLORIDA**

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## INTERESTS OF *AMICI CURIAE*<sup>1</sup>

*Amici curiae* constitute a broad-based consortium of secular organizations dedicated to the humane treatment of animals. Though they come to this case holding diverse views and goals, the *amici curiae* agree that — as articulated in the 1641 Massachusetts Bay Colony “*Body of Liberties*” — “[n]o man [may] exercise any Tyranny or Cruelty towards any brute Creature . . . .”<sup>2</sup>

*International Society for Animal Rights*, founded in 1959 in the District of Columbia,<sup>3</sup> now has some 25,000 members and supporters worldwide. Its chartered purposes include promoting “protection for animals from all forms of cruelty and suffering inflicted upon them for the demands of science, profit, sport or from neglect or indifference to their welfare or from any other cause [and seeking] to prevent nationwide causes of cruelty to and suffering in animals [and publishing materials] dealing with the individual aspects of animal welfare [and conducting] mass humane education . . . to foster mercy, compassion and respect for animals . . . .” *International Society for Animal Rights* is often requested by other animal rights organizations to furnish memoranda and *amicus curiae* briefs in animal rights cases throughout the United States.

*Citizens for Animals*, organized two decades ago, is a grassroots national organization devoted to the promotion of animal rights. Like *International Society for Animal Rights*, and in furtherance of its constituents’ values, *Citizens for Animals* is committed to making its position known to the courts through the submission of *amicus curiae* briefs.

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<sup>1</sup> *Amici* file this brief with permission of respondent; we understand that the blanket consent of petitioners has been filed with the Clerk of this Court.

<sup>2</sup> William H. Whitmore, *A Bibliographical Sketch of the Laws of the Massachusetts Colony From 1630 to 1686*, at 52 & 53 (1890).

<sup>3</sup> The organization’s name was originally National Catholic Society for Animal Welfare. In 1972 it was changed to Society for Animal Rights and then to *International Society for Animal Rights*.

*Farm Animal Reform Movement* is a national, non-profit, public interest organization formed in 1981 by animal, consumer, and environmental protection advocates to expose and stop animal abuse and other destructive impacts of factory farming.

*In Defense of Animals* is a national, non-profit organization with over 50,000 members. It pursues change in the treatment of animals in industries that exploit them, in the lifestyles that support such industries, and in the attitudes that prevent recognition of the lives and rights of animals. It also attempts to stop current abuses in laboratory research and elsewhere. It pursues these goals through all available legal means.

*Performing Animal Welfare Society*, founded in 1985, is dedicated to the rescue of performing and exotic animals from cruel confinement and performances of pain. It investigates reports of abused performing animals and captive wildlife; rescues animals through intervention, legislation, and outright purchase; shelters rescued animals on a 20-acre sanctuary in Galt, California; works for legislation to protect all performing and exotic animals from neglect and cruelty; and educates the entertainment industry, legislators and the general public in the humane handling and care of animals.

*Student Action Corps for Animals* is a national, non-profit educational organization whose membership is composed of students in junior high school, high school, and college. The organization provides support, information, and a communications forum in the form a newsletter, to adolescents and adult advisors. Many young people who are members strongly believe that animals have the right not to be exploited for human purposes. Most members follow this principle by striving not to exploit animals in their own lives, and by not participating in the use of animal lives for educational purposes. The organization is composed of students from every state in the country.

## SUMMARY OF ARGUMENT

The Court should abandon the compelling state interest test, to the extent that it exists, in cases involving a constitutional claim *to act* contrary to law in the name of religion. *Amici* argue that while the compelling state interest test entered Free Exercise jurisprudence properly via cases involving religious *speech*, it is a mistake to apply that test in cases involving religious *action*. Where religious claims *to act* are raised, *heightened*, rather than *strict*, scrutiny is appropriate and the state should have to present the existence of an important and legitimate interest in order to constrain religious practices. Because the interests of the City of Hialeah are unquestionably important and legitimate, petitioners' claim of a purported constitutional right to sacrifice animals in that municipality should be rejected and the Court should affirm the judgment of the court of appeals.

## ARGUMENT

For good reasons this Court has almost always been unreceptive to Free Exercise challenges where the claimed right of a party *to act* in the name of religion has clashed with an important and legitimate governmental interest. *See, e.g., Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 133 U.S. 333 (1890); *Mormon Church v. United States*, 136 U.S. 1 (1890); *Hamilton v. Regents*, 293 U.S. 245 (1934); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *United States v. Ballard*, 322 U.S. 78 (1944); *Cleveland v. United States*, 329 U.S. 14 (1946); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Jehovah's Witnesses v. King County Hosp.*, 390 U.S. 598 (1968); *Gillette v. United States*, 401 U.S. 437 (1971); *Johnson v. Robison*, 415 U.S. 361 (1974); *United States v. Lee*, 455 U.S. 252 (1982); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Bowen v. Roy*, 476 U.S. 693 (1986); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Hernandez*

*v. Commissioner*, 490 U.S. 680 (1989); *Smith v. Employment Div., Dept. of Human Resources*, 494 U.S. 872 (1990) (*Smith II*); *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 60 U.S.L.W. 4749 (June 26, 1992).

Thus, from the very beginning of its Free Exercise jurisprudence, the Court has apparently realized that to permit citizens to do in the name of religion that which is proscribed by the legitimate laws of the state is to invite anarchy, permitting each man to be a floating island of private law governed only by the dictates of real or supposed religiously-motivated conscience. See *Reynolds*, 98 U.S. at 167. Conversely, however, the Court also apparently recognized early that the existence of the Free Exercise Clause and its history means, at the very least, that there must be no governmental intrusion whatsoever upon religious belief. See *id.* at 163. "Laws," the Court has written, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.* at 166. This commonsensical — and necessary — belief/action dichotomy has been stressed repeatedly. Accordingly, compared to the twenty-two cases cited *supra* — where religious claims have lost out to a law prohibiting doing — are those cases involving government compulsion of belief, where the religious claimant has always handily won.<sup>4</sup>

<sup>4</sup> Claims to polygamy, to exemption from ROTC training, to unfettered access to public by-ways, to exemption from child labor laws, to the fraudulent solicitation of funds, to exemption from blue laws, to withhold life-saving treatment from children, to exemption from being drafted into "unjust wars," to educational benefits despite conscientious objector status in alternate civilian service, to exemption from employer social security taxation, to favored tax status for racial discrimination, to exemption from minimum wage laws, to exemption from military dress code, to exemption from laws designed to curb welfare fraud, to exemption from prison regulations, to the preservation of the natural state of federal lands, to the tax-deductibility of the cost for participating in set-fee religious services, to take peyote, and to solicit contributions in an airport as part of a

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The latter type of cases, where the state has attempted to interfere with, or even force, belief are *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Wooley v. Maynard*, 430 U.S. 705 (1977); and *McDaniel v. Paty*, 435 U.S. 618 (1978).<sup>5</sup> In *Pierce* the inculcation of religious belief through parochial education was threatened by state-mandated secular education; in *Barnette* the religious belief of Jehovah's Witnesses that it is a sin to worship "graven images" such as a flag was threatened by a board of education resolution requiring a daily salute to the U.S. flag by school children; in *Torcaso* a notary public's freedom of belief and religion was threatened when he was denied a commission because of his refusal to declare his belief in God; in *Yoder* a state statute compelling children to attend school until age 16 threatened the Amish belief that remaining unworldly is essential to the maintenance of their religiously-mandated simple way of life; in *Wooley* the Jehovah's Witnesses' religious-based belief against fealty to the state was threatened by New Hampshire's requirement that all noncommercial vehicles have license plates bearing the state's motto, "Live Free or Die"; and in *McDaniel* the strong religious beliefs that impel some to the clergy was threatened by a state constitutional provision barring ministers

<sup>4</sup>(...continued from preceding page)

religious ritual, all failed in light of the important and legitimate governmental interests they opposed.

<sup>5</sup> As noted by the Court in *Smith II*, 494 U.S. at 882, *Barnette* and *Wooley* were decided exclusively on free speech grounds, though they also involved freedom of religion. Moreover, a plurality of the Court in *McDaniel* (BURGER, C.J., and POWELL, REHNQUIST, and STEVENS, JJ.) decided the case on the basis of Free Exercise action while three Justices (BRENNAN, MARSHALL, and STEWART, J.J.) concurred on the basis of Free Exercise belief. Though these cases are not necessary to carry the argument, they are raised here because religious belief was, perforce, involved, and because they help reveal an undeniable thrust in the Court's jurisprudence. Cf. *Stromberg v. California*, 283 U.S. 359 (1931).

or priests from either house of the state legislature. *In all of these cases the threatened belief was vindicated*, the threatening law struck down, for, as JUSTICE JACKSON wrote for the Court in *Barnette*, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein," 319 U.S. at 642, and, as the Court reiterated in a somewhat different context, under the Free Exercise Clause "freedom to believe . . . is absolute." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

Hence, analysis discloses that the action/belief dichotomy of this Court's Free Exercise jurisprudence has long been clear: religiously inspired action — sometimes, at least — can be regulated; religious belief cannot. *See also, e.g., Smith II*, 494 U.S. at 877 (Court holds religiously-inspired use of peyote is subject to state's drug laws while reiterating that "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all 'governmental regulation of religious beliefs as such'" (quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)); *Bowen*, 476 U.S. at 699 ("Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute"); *Bob Jones Univ.*, 461 U.S. at 603 ("This Court has long held the Free Exercise Clause of the First Amendment to be an absolute prohibition against governmental regulation of religious beliefs . . . . However, '[n]ot all burdens on religion are unconstitutional'" (citations omitted) (quoting *Lee*, 455 U.S. at 257); *Gillette*, 401 U.S. at 461 (while Free Exercise Clause bars governmental regulation of religious beliefs, "[o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government"); *Jehovah's Witnesses*, 390 U.S. at 598 ("The judgment is affirmed, *Prince v. Massachusetts*, 321 U.S. 158") (*per curiam* decision upholding three-judge district court dismissal of action wherein parents

claimed right to forbid blood transfusions for their children based on religious belief); *Braunfeld*, 366 U.S. at 603-04 ("legislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion") (WARREN, C.J., for plurality); *Ballard*, 322 U.S. at 87 ("'With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with'" (quoting *Davis*, 133 U.S. at 342).

Before turning to the "tests" used by the Court to determine when religious action may be regulated, it is important first to linger upon the actual nature of religious belief, examining why its protection has been held so absolute.<sup>6</sup> The policy behind freedom of religious belief, it appears, is shared by the First Amendment as a whole and that policy involves the fostering and protection of

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<sup>6</sup> Some have suggested that as *belief* is the very predicate for the "exercise" of religion, it is expressly protected by the Constitution. But to say that freedom of religious belief is expressly protected by the Constitution is nothing more than to state a conclusion, shedding no light on *why* it is protected. *See, e.g., Prince*, 321 U.S. at 174 (freedom of religious belief is "'of the very essence of a scheme of ordered liberty'" (MURPHY, J., dissenting) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Indeed, virtually all other rights expressly (and impliedly) protected or recognized by the Constitution can hardly claim the *absolute* protection from governmental interference routinely enjoyed by freedom of religious belief. Another rationale posited for this absolute freedom is that the belief prong of the Free Exercise Clause is the result of the long catalogue of human folly wherein governments have attempted to homogenize religious belief by law. *See Davis*, 133 U.S. at 342. This problem, however, is undoubtedly covered by the Establishment Clause and the jurisprudence that has emerged from it.

something which is seen as not only desirable in itself but as something that is necessary to the very preservation of free government: *the marketplace of ideas*. This has found manifold expressions in the opinions of this Court. Thus, in *Prince* the Court said that freedom of conscience and freedom of the mind are equally protected by the First Amendment because they are inseparable. JUSTICE RUTLEDGE astutely wrote for the Court:

"All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life."

321 U.S. at 164-65. And in *Cantwell* the Court stated:

"In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

310 U.S. at 310; *see also id.* (essential characteristic of First Amendment liberties is that "many types of life, character, opinion and belief can develop unmolested and unobstructed"). And in *Wooley*, CHIEF JUSTICE BURGER noted that the First Amendment secures the right to proselytize religious, political, and ideological causes against the state's attempted invasion of the sphere of intellect and spirit. 430 U.S. at 714-15 (citing and quoting

*Barnette*, 319 U.S. at 642 (JACKSON, J., concurring) and *id.* at 642 (opinion of Court)); *see also Goldman*, 475 U.S. at 507 (rejecting Free Exercise claim of Air Force doctor to wear yarmulke noting deference due to military regulations as "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment"); *Wallace v. Jaffree*, 472 U.S. 38, 49-55 (1985) (noting freedom of conscience as unifying theme of First Amendment). This concept was most recently reiterated by JUSTICE KENNEDY in *Lee v. Weisman*, 60 U.S.L.W. 4723, 4726 (June 24, 1992) who, writing for the Court, noted that "[t]he Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment . . . ." For "[t]o endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry." *Id.*

The reason, of course, for the importance of freedom of thought, denominated the "marketplace of ideas" (embracing the religious, political, philosophical, and other realms of the mind) — together with the rights to free speech, to free press, to freedom of association, to freedom of peaceable assembly, and, in our fifty-state federalist system, to the freedom of travel — is that the unimpeded exercise of these freedoms is the foundation upon which the existence of all our other rights depends. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *see also Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969); *Wesberry v. Sanders*, 376 U.S. 1, 6-7, 17 (1964); *Ballard*, 322 U.S. at 86; *Palko v. Connecticut*, 302 U.S. 319, 325, 326-27 (1937) *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969); *Stromberg v. California*, 283 U.S. 359, 369 (1931). Indeed, the freedom of thought and speech, considered together as one, perhaps occupies the preferred position in the Constitution, for "[o]f that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko*, 302 U.S. at 327 (emphasis added). Thus considered, the underlying rationale is revealed behind noble

statements such as “[f]reedom of press, freedom of speech, freedom of religion are in a preferred position,” *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943), and “the interpreters of the Constitution find the purpose [of the First Amendment] was to allow the widest practical scope for the exercise of religion and the dissemination of information,” *id.* at 121 (REED, J., dissenting).<sup>7</sup> So it is not surprising that it is in cases dealing with religious *speech* that one finds not only the initial applications of the First Amendment to the states, but an all-but absolute protection (like that accorded to religious belief) through employment of the compelling state interest test. As demonstrated *infra*, however, this laudable effort to protect religious *speech* led to the lamentable result that the compelling state interest test was indiscriminately, and erroneously, applied to the realm of religious *action*.

In *Schneider v. State*, 308 U.S. 147 (1939), citing “the individual liberties secured by the Constitution to those who wish to speak, write, print, or circulate information or opinion,” *id.* at 160, — rights that lie “at the foundation of free government by free men,” *id.* at 161, and are “so vital to the maintenance of democratic institutions,” *id.* — and adverting to the liberty to “impart information through speech or the distribution of literature,” *id.* at 160, and to “the dissemination of information and opinion,” *id.* at 163, this Court, *inter alia*, invalidated an ordinance that forbade unlicensed door-to-door solicitation and distribution of circulars as applied to a Jehovah’s Witness’s attempted profession and propagation of the faith. The test that

<sup>7</sup> And thus is explained JUSTICE STONE’s citation to *Pierce v. Society of Sisters* for the suggestion that when reviewing statutes directed at particular religious minorities, prejudice against such minorities may be “a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” *Carolene Products*, 304 U.S. at 153 n.4. For without the ability to maintain and augment the number of believers through religious education, a religion loses much of its ability to protect itself through the political process.

JUSTICE ROBERTS applied for the Court was that “[i]n every case . . . where legislative abridgement of the rights [to freedom of speech] is asserted, the courts should be astute to examine the effect of the challenged legislation . . . [T]he courts [must] weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights,” *id.* at 161.

There then followed *Cantwell v. Connecticut*, 310 U.S. 296 (1940), also written by JUSTICE ROBERTS. Citing *Schneider*, the Court for the first time held that the First Amendment’s Free Exercise Clause applied to the States via the Due Process Clause of the Fourteenth Amendment, overturning the convictions of Jehovah’s Witnesses under a statute which acted as a “prior restraint” upon “the dissemination of religious views or teaching.” *Id.* at 304 (citing *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (which was, of course, a pure speech/press case). Such censorship could not be countenanced, said the Court, because it implicated the religion’s very right to survive, *id.* at 305, through “the solicitation of aid for the perpetuation of religious views or systems,” *id.* at 307. Moreover, with regard to the conviction of one of the three Witnesses involved for breach of the peace, this Court equated “the free exercise of religion” with the “freedom to communicate information and opinion,” *id.* at 307, and held that the conviction could not stand based on speech which, though offensive, did not amount to fighting words. *See id.* at 309. The test that the Court applied in this latter part of *Cantwell* was that a conviction for “only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion,” *id.* at 310, had to fail “in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State,” *id.* at 311. Comparing the case before it to, *inter alia*, *Schenck v. United States*, 249 U.S. 47, 52 (1919) (HOLMES, J.) (which involved criminalization of *speech* that posed a clear and present danger to national security), *see Cantwell*, 310 U.S. at 311 n.10, the *Cantwell* Court held that “petitioner’s communication,

considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question," *id.* at 311. Thus, yet another victory for the profession and propagation of *belief*, i.e., religious speech. *See id.* at 310 (manifestly revealing the "marketplace-of-ideas" basis for the holding). And thus, perhaps even more significant, the entrance of what came to be called the "compelling state interest test" into the Court's Free Exercise *speech* jurisprudence.

Hard on the heels of *Schneider* and *Cantwell* were more "Witness" cases — again and again vindicating their thwarted attempts at profession and propagation — virtually all of which were steeped in the language of First Amendment speech jurisprudence, carried over into Free Exercise. *See especially, Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Marsh v. Alabama*, 326 U.S. 501 (1946).<sup>8</sup>

During this time, of course, the Court's long-standing action/belief dichotomy was far from repudiated—indeed, it was reiterated repeatedly. *See Schneider*, 308 U.S. at 160; *Cantwell*, 310 U.S. at 304; *Cox*, 312 U.S. at 578; *Murdock*, 319 U.S. at 116; *Martin*, 319 U.S. at 143; *Prince*, 321 U.S. at 166-67; *Ballard*, 322 U.S. at 87; *Cleveland*, 329 U.S. at 20; *Braunfeld*, 366 U.S. at 603.

At this point, *amici* submit, the Court had articulated the proper state of Free Exercise jurisprudence: religious *belief* was absolutely protected (*Pierce*); religious *speech* was protected against all but compelling state interests (*Cantwell*, *Murdock*, *et al.*); and religious *action*, however, was capable of regulation if inimical to the health, safety, welfare, and morals of society (*Reynolds*, *Davis*, *Mormon Church*, *Cox*, *Prince*, *Ballard*, *Cleveland*, and *Braunfeld*). Thus, the Court's Free Exercise jurisprudence then matched a statute drafted by Thomas Jefferson that had been promulgated by the Virginia House of Delegates and

<sup>8</sup> *See also Jones v. Opelika*, 319 U.S. 103 (1943); *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

which read: "to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain *the profession or propagation of principles* on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty"—"it is time enough for the rightful purposes of civil government, for its officers to interfere *when principles break out into overt acts* against peace and good order." An Act for Establishing Religious Freedom, 1785 Va. Stat., ch. xxxiv (*reprinted in* 12 Hening's Stat. 84, 85 (1823)) (emphasis added) (quoted by *Reynolds*, 98 U.S. at 163). "In these two sentences," this Court has acknowledged, "is found the true distinction between what properly belongs to the church and what to the State." *Reynolds*, 98 U.S. at 163.<sup>9</sup>

*Amici* respectfully suggest, therefore, that *the* fundamental error in this Court's Free Exercise jurisprudence occurred in *Sherbert v. Verner*, 374 U.S. 398 (1963).

The prelude to *Sherbert* came in JUSTICE BRENNAN's opinion in *Braunfeld*, dissenting from the Court's rejection of the claim of Orthodox Jews that Sunday blue laws impermissibly burdened the free exercise of their religion. JUSTICE BRENNAN's dissenting opinion foreshadowed the unseen manner in which the "'grave and immediate danger'" test, *Braunfeld*, 366 U.S. at 612 (BRENNAN, J., dissenting) (quoting *Barnette*), or the "compelling state interest" test, *id.* at 613 (*ipse dixit*), was permitted to seep into the religious *action* side from the belief and speech side of the Free Exercise

<sup>9</sup> This concept found its most recent expression in the net result of two speech cases decided late last term, *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 60 U.S.L.W. 4749 (June 26, 1992), and *Lee v. International Soc'y for Krishna Consciousness, Inc.*, 60 U.S.L.W. 4761 (June 26, 1992) (*per curiam*). There, against the claimed right of a sect for its members to be able to "perform a ritual known as sankirtan . . . [w]hich consists of going into public places, disseminating religious literature and soliciting funds to support the religion," 60 U.S.L.W. at 4750 (internal quotations and citations omitted), a municipal airport's ban on solicitation was *upheld*, *id.* at 4753, but the airport's ban on distribution of literature was *struck down*, 60 U.S.L.W. at 4761.

Clause.<sup>10</sup> "This exacting standard," wrote JUSTICE BRENNAN, "has been consistently applied by this Court as the test of legislation under all clauses of the First Amendment, not only those specifically dealing with freedom of speech and of the press. For religious freedom — the freedom to believe and to practice strange and, it may be, foreign creeds — has classically been one of the highest values of our society." *Id.* at 612. JUSTICE BRENNAN then proceeded to cite, by way of example, *Murdock*, *Jones*, *Martin*, *Follett*, and *Marsh*. *Id.* In JUSTICE BRENNAN's opinion, these cases, together with *Barnette* — even though they dealt with the highly protected area of religious belief and religious speech — justified the application of the compelling state interest test so as to permit the *Braunfeld* claimants to act contrary to the law because of their religion.

JUSTICE BRENNAN, of course, carried the day two years later in *Sherbert*, where he wrote the opinion for the Court, and where it for the first time applied the compelling state interest test to a religiously-inspired claim to act. Adverting first to *Cantwell*, *Torcaso*, *Fowler*, and *Murdock* (all of which involved religious belief or speech), see *Sherbert*, 374 U.S. at 402, and while noting that certain religious conduct which has "invariably posed some substantial threat to public safety, peace or order" (notably omitting "morals," but citing *Reynolds*, *Prince*, and *Cleveland*), *id.* at 403, JUSTICE BRENNAN observed that the state's "incidental burden" on *Sherbert*'s free exercise could only be "justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . .'" *NAACP v. Button*, 371 U.S. 415, 438." *Id.* (*Button*, of course, was a freedom of

<sup>10</sup> See also *Braunfeld*, 366 U.S. at 607 (plurality opinion) ("If the purpose or effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid even though the burden may be characterized as being only indirect") (citing *Cantwell*). But see *id.* at 603-604 ("legislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion").

association case.) In *Sherbert*, the state and its arguably important and legitimate interest lost; *Sherbert*'s claim to act in the name of religion prevailed. Thereafter, the results in *Thomas v. Review Board of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987), were foreordained. And ever since *Sherbert* the Court had to deal with the tar baby called the compelling state interest test — sometimes working with it, see *Gillette*; *Johnson*; *Thomas*; *Lee*; *Bob Jones Univ.*; *Hobbie*; *Hernandez*, sometimes getting around it, see *Tony & Susan Alamo Found.*; *Lyng*; *O'Lone*; *Goldman*; *Smith I*, and sometimes coming out against it, see *Bowen*; *Smith II*.

The Court's decision to insist upon *compelling state interests* in the *action* side of Free Exercise was a mistake not because the free exercise of religion is unworthy of protection. It was a mistake because the otherwise unrestrained freedom to act contrary to law in the name of religion can relegate to oblivion *other important and legitimate interests* of an ordered society, interests which, while not "grave" or "compelling," are nonetheless basic to a *civilized* voluntary association of free men. Even as early as *Braunfeld*, the Court began to express concerns about restricting "the operating latitude of the legislature" whenever a claimant waved the flag of Free Exercise, see *Braunfeld* 366 U.S. at 606, a concern that the Court echoed in *Lee*, see 455 U.S. at 262. And most recently in *Smith II*, the Court again reiterated this concern:

"Precisely because we are a cosmopolitan nation made up of people of almost every conceivable religious preference, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."

494 U.S. at 888 (internal quotation and citation omitted).

The Court's concern is especially justified given the allocation of burdens in a Free Exercise lawsuit. For in light of the deference accorded to legislative enactments when their constitutionality is

challenged in non-religious-based suits (where the plaintiff's injury is usually concrete, see *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 728 (1984); see also *Lucas v. South Carolina Coastal Council*, 60 U.S.L.W. 4842, 4853 (June 29, 1992) (BLACKMUN, J., dissenting)), there would be much to say in Free Exercise cases (where injury, perforce, is ephemeral) of requiring plaintiffs to prove by clear and convincing evidence that the government has prevented them from performing a religious duty.<sup>11</sup> Instead, as matters stand today, in a Free Exercise case the mere mention of religion causes some to believe that the usual presumption of constitutionality dissolves. See *Prince*, 321 U.S. at 167. Indeed, a religious claimant need not even show that the religious practice at issue is central to a faith. See *Smith II*, 494 U.S. at 886-87; *Hernandez*, 490 U.S. at 699. The belief impelling the claimant to act need only be religious, cf. *Yoder*, 406 U.S. at 235, and sincerely held, see *Hobbie*, 480 U.S. at 138 n.2 ("It is undisputed that appellant's conversion was bona fide and that her religious belief is sincerely held"); *Bob Jones Univ.*, 461 U.S. at 602 n.28 ("The District Court found, on the basis of a full evidentiary record, that the challenges practices of petitioner Bob Jones University were based on a genuine belief that the Bible forbids interracial dating and marriage"); cf. *Ballard*, 322 U.S. at 84; *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968) (drug-taking sect whose motto was "Victory Over Horseshit!" was not a sincere religion). And so long as plaintiff's religion "is burdened," *Thomas*, 450 U.S. at 718 (emphasis added), the defendant, the state, is then forced to justify the law. See *McDaniel*, 435 U.S. at 628-29 (state failed in proving that its once-arguably-important interest had not lost its validity with time). But see *id.* at 625

<sup>11</sup> See, e.g., *Reynolds*, 98 U.S. at 161; *Davis*, 133 U.S. at 341; *Mormon Church*, 136 U.S. at 18; *Schneider*, 308 U.S. at 159; *Murdock*, 319 U.S. at 108; *Prince*, 321 U.S. at 163; *Braunfeld*, 366 U.S. at 601; *Sherbert*, 374 U.S. at 399 n.1; *Thomas*, 450 U.S. at 710; *Lee*, 455 U.S. at 255; *Bob Jones Univ.*, 461 U.S. at 580, 602 n.28; *Goldman*, 475 U.S. at 513 (BRENNAN, J., dissenting); *Hobbie*, 480 U.S. at 138; *O'Lone*, 482 U.S. at 345 — all noting that a religious duty was at issue.

(against historical background Court would not "lightly invalidate a statute enacted pursuant to a provision of a state constitution which has been sustained by its highest court").

The modern explosion of real and supposed religions under the putative protection of Free Exercise Clause jurisprudence also indicates the mistake of applying the compelling state interest test in cases involving religious action. For, while the Free Exercise Clause may once have been perceived to protect only Christianity or "established" religions, cf. *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985), it is now rightly held to extend its protection to all religious beliefs.

"We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents."

*Zorach v. Clauson*, 343 U.S. 306, 313 (1952). In the context of a Free Exercise case today, then, virtually anything goes. "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas*, 450 U.S. at 714. "Courts," we have been told, "should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Id.* at 715.<sup>12</sup> The "religion" involved can be a religion even of one. See *Bowen*, 476

<sup>12</sup> Thus, in *Bowen*, which was predicated upon the plaintiff's "recently[-] developed . . . religious objection to obtaining a Social Security number for [his daughter] Little Bird of the Snow," 476 U.S. at 696 (emphasis added), the plaintiff Roy was permitted casually to change his religious views mid-trial when it was discovered that his daughter already had a Social Security number — apparently only then did it occur to Mr. Roy that Little Bird of the Snow's spirit would be "robbed" of its power only by the use of her Social Security number. *Id.* at 697.

U.S. at 696; see also *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985). Thus, given the current unprecedented surge in immigration,<sup>13</sup> and given that the great bulk of immigrants are coming from areas that traditionally have not shared the "Judeo-Christian" ethic,<sup>14</sup> and given the virtually limitless capacity of the human spirit (or mind) for revelation (or improvisation and rationalization),<sup>15</sup> religious claims *to act* which are contrary to our

<sup>13</sup> See Margaret L. Usdansky, *Immigrant Tide Surges in '80s*, USA Today, May 29, 1992, at 1 ("The USA's largest 10-year wave of immigration in 200 years — almost 9 million people — arrived during the 1980s") (citing Census Bureau figures).

<sup>14</sup> See Immigration & Naturalization Service, *1990 Statistical Yearbook* 50 (1991) (immigration from Asia, 1981-90: 2,738,157; Caribbean, 1981-90: 872,051; Europe, 1981-90: 761,550).

<sup>15</sup> See, e.g., Larry Rohter, *Sect's Racketeering Trial Is Set To Open*, N.Y. Times, Jan. 6, 1992, at A14 (discussing allegations that Yahweh ben Yahweh, leader of Temple of Love, Nation of Yahweh, and The Brotherhood, required his inner circle to kill "white devils" and present to him their severed ears as proof of the deed); Larry Rohter, *Sect Leader Convicted On Conspiracy Charge*, N.Y. Times, May 28, 1992, at A16 (Yahweh ben Yahweh found guilty); Marjorie Miller & J. Michael Kennedy, *Mexico Massacre: Potent Mix of Ritual and Charisma*, L.A. Times, May 16, 1989, at 1 (discussing human sacrifice of University of Texas student, Mark Kilroy of Sante Fe, by marijuana-smuggling practitioners of Palo Mayombe in Matamoros, Mexico); John Huxley, *Sex-Cult Children Held*, Sunday Times (London), May 17, 1992 (sexual and psychological abuse of children sanctioned by Children of God religious sect); *Religion Based on Sex Gets a Judicial Review*, N.Y. Times, May 2, 1990, at A17 (federal district judge considers whether to halt state prosecution for prostitution by priestess of Church of the Most High Goddess; church, based on "absolution" through sex and "sacrifice" through payment of money, worships Egyptian goddess of fertility, Isis; priestesses must have sexual relations with 1,000 men before qualifying for priesthood); Anthony Flint, *Paganism Seeing a Resurgence*, Boston Globe, Apr. 27, 1992, at 1 (Metro/Region Section) (Paganism is "a confluence of people looking for alternatives," quoting codirector of The  
(continued on next page...)

essentially Western law<sup>16</sup> will inevitably proliferate on a grand scale. This tide of "religiosity" will only augment the already-taxed relations between religious claimants and our enlarged 20th century governments. See *Bowen*, 476 U.S. at 707, 707 n.17; *Thomas*, 450 U.S. at 721 (REHNQUIST, J., concurring in part and dissenting in part). And while "[t]he rise of the welfare state" should not spell the decline of the Free Exercise Clause, *Bowen*, 476 U.S. at 732 (O'CONNOR, J., concurring in part and dissenting in part), still, the increase in the scope and number of religious claims *to do* contrary to law should not be allowed to *un-do* the legitimate ends of civilization.

For these reasons *amici* propose that the compelling state interest test be abandoned in cases involving Free Exercise *action*

<sup>16</sup>(...continued from preceeding page)

EarthSpirit Community); *Exempt Organizations—Charitable Contributions Made to Venusian Church Disallowed*, Daily Report for Executives, Mar. 13, 1987, at H-12 (discussing Venusian Church that runs adult pornographic film booths and live sex shows); *Women Break 107-Day Fast After Learning of Parole*, AP, Dec. 3, 1987, available in LEXIS, Nexis Library, AP File (religious sect called Sons of Freedom Doukhobors believes in public nudity and burning material possessions); *Renegade Mormons*, Newsweek, Jan. 20, 1975, at 72 (violent sect practicing polygamy in Mexican commune as Church of the First Born in the Fullness); Peg McEntee, *Polygamy Endures a Century After Mormon Church Rejects It*, AP, May 19, 1990, available in LEXIS, Nexis Library, AP File (5,000 polygamists living in western states under Church of Apostolic United Brethren).

<sup>16</sup> But see *Lyng*, 485 U.S. at 473, 474 (BRENNAN, J., dissenting) (suggesting that Western concepts of land, centered around notions of ownership and use of private property, be balanced against those of Native Americans "in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred"). Interestingly, this issue was raised at trial when petitioner Pichardo accused counsel for respondent of "applying western logic to a religion which is not western." (R729) "Mr. Pichardo," said the late District Judge Spellman, "so you understand, we're applying western law as well." (R730)

claims (if indeed it has ever truly been applied outside of the unemployment benefits context of *Sherbert, Thomas, and Hobbie*, see *Lee*, 455 U.S. at 263 n.3 (STEVENS, J., concurring)).<sup>17</sup> However, in urging the Court to abandon in Free Exercise *action* cases the most stringent test to have emerged from the Equal Protection Clause, *amici* do not suggest that the Equal Protection Clause's lowest test, "rational relation," be adopted. Cf. *Bowen*, 476 U.S. at 727 (O'CONNOR, J., concurring in part and dissenting in part). That test would not accord Free Exercise the obviously heightened protection that it deserves, and for this reason *amici* also respectfully suggest that the "general law" formulation of *Smith II* is flawed as well. On the one hand, the general law test is too susceptible to legislative legerdemain. Under it, too much depends on legislative craft and not enough on evaluating the government's interest and intent as juxtaposed against the religious claim. Thus, in this case, for instance, under the exact same circumstances as obtained when the challenged ordinance(s) was enacted, the City of Hialeah could have promulgated a law stating: "No one, except licensed commercial purveyors of food for human consumption, may possess live turtles, fowl, goats, sheep, and other livestock." Had this ordinance been passed, *certiorari* probably would never have been granted. Indeed, under the general law test, the validity of such an ordinance would have been definitively and quickly disposed of in the lower court(s); Hialeah's interests and intent in passing the ordinance would have remained unscrutinized — even though the law would still have been promulgated precisely *because of* petitioners' announced intention

<sup>17</sup> Yet another reason for abandoning the compelling state interest test in Free Exercise *action* cases is that by purporting to set the water mark so very high, while simultaneously realizing that such a standard is very hard to meet and intuitively sensing that it is an impossible burden in a religiously-pluralistic ordered society, courts are constrained to hold proffered state interests to be "compelling," even though, truly, they are important and legitimate at best. The compelling state interest test is thus dangerously devalued as a tool against repression in the contexts of race and speech.

to open up a Santerian church. (A22, A28) But because Hialeah's drafting was a bit more specific and forthrightly declared that the City was appalled by the ritual or ceremonial killing of animals not primarily for the purpose of food consumption, this Court's attention was engaged and Hialeah now bears the burden of arguing compelling interests (even though, in the opinions of *amici*, the ordinances, truly, are general<sup>18</sup>). Thus, in addition to being *under*-protective of religious claims to conduct, the general law formulation is *over*-protective as well by leaving legislatures no operating latitude to target antisocial action when religious practitioners are the only ones currently interested in committing the act. Cf. *Dawson v. Delaware*, 112 S. Ct. 1093, 1102 (1992) (THOMAS, J., dissenting) ("Although we do not sit in judgment of the morality of particular creeds, we cannot bend traditional concepts of relevance to exempt the antisocial").

*Amici* support *heightened* scrutiny as the proper test for religious claims to act contrary to law, a test familiar from, and similar to, the intermediate level of Equal Protection analysis. See, e.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *Clark v. Jeter*, 486 U.S. 456 (1988); *City of Cleburne v. Cleburne*

<sup>18</sup> The ordinances were truly general, of course, because they applied to both religious and non-religious ritual or ceremonial killings of animals not for the primary purposes of food. They would, for instance, penalize the action of college students who, in a drunken spree, ceremonially hack to death a beached dolphin in homage to "The God of Spring Break," and arguably would prohibit tradition-laden English-style fox hunting. Moreover, unlike the law in *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991), the ordinances at issue here are applicable *everywhere* in Hialeah. Cf. *id.* at 2472 (WHITE, J., dissenting). *Amici* wish to make clear that they agree with respondent that the ordinances are general laws and, in the alternative, that they are supported by compelling interests. *Amici* approach the case from a different perspective, however, because we believe in the correctness of the arguments set forth herein, and because by presenting them we hope to perform a service by laying before the Court "relevant matter . . . that has not already been brought to its attention . . ." See Sup. Ct. R. 37.1.

*Living Center*, 473 U.S. 432 (1985); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Mills v. Habluetzel*, 456 U.S. 91 (1982); *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971). Under this test, laws supported by important and legitimate governmental interests would survive religious claims to act contrary to them. *Cf. Bowen*, 476 U.S. at 709 ("The Social Security number requirement clearly promotes a legitimate and important public interest").<sup>19</sup> In this case, the interests of Hialeah are undoubtedly *important*. Prevention of cruelty to animals has long been recognized as well within the states' police power to safeguard the health, safety, welfare, and morals of its citizens. See *People v. Reed*, 176 Cal. Rptr. 98,103 (App. Dep't Super. Ct. L.A. County 1981); *Bland v. People*, 76 P. 359, 360-61 (Colo. 1904); *Johnson v. District of Columbia*, 30 App. D.C. 520, 522 (1908); *C.E. America, Inc. v. Antinori*, 210 So. 2d 443, 444 (Fla. 1968); *Hargrove v. State*, 321 S.E.2d 104, 108 (Ga. 1984); *State v. Abellano*, 441 P.2d 333, 340 (Haw. 1968); *Illinois Gamefowl Breeders Ass'n v. Block*, 389 N.E.2d 529, 532 (Ill. 1979); *State v. Karstendiek*, 22 So. 845, 846-47 (La. 1897); *State v. Starkey*, 90 A. 431, 432, 433 (Me. 1914); *Commonwealth v. Higgins*, 178 N.E. 536, 537 (Mass. 1931); *City of St. Louis v. Schoenbusch*, 8 S.W. 791, 792 (Mo. 1888); *State v. Prince*, 94 A. 966, 966 (N.H. 1915); *State v. Davis*, 61 A. 2, 4 (N.J. Super. Ct. 1905), *aff'd*, 64

<sup>19</sup> And under this test, the real-life parade of general-law horrors that is set forth in the brief of *Amici Americans United For Separation of Church and State, et al.* at 19-24, arguably would be avoided. For instance, the generally important governmental interest in having autopsies performed in all cases involving an unnatural death arguably is not present, and thus is not legitimate, when the case involves an Conservative Jew who is killed in a car accident. And the view of the City of New York, that it is better for the homeless to sleep in the street rather than in a homeless shelter without an elevator, arguably fails to produce a governmental interest important enough to trump the religiously-inspired charitable activity of Mother Teresa's sisters. Heightened scrutiny would help eliminate the cases where appalling results are reached due to the general law formulation's failure to examine the importance and legitimacy of the governmental interests involved.

A. 1134 (1906); *Barrett v. State*, 116 N.E. 99, 101 (N.Y. 1917); *State v. Longhorn World Championship Rodeo, Inc.*, 483 N.E.2d 196, 200, 201 (Ohio Ct. App. 1985); *Kuchler v. Weaver*, 100 P. 915, 921-22 (Okla. 1909); *Commonwealth v. Bonadio*, 415 A.2d 47, 49 (Pa. 1980); *State v. Tabor*, 678 S.W.2d 45, 48 (Tenn. 1984); *Cinadr v. State*, 300 S.W. 64, 65 (Tex. Crim. App. 1927); *Peck v. Dunn*, 574 P.2d 367, 369 (Utah) *cert. denied*, 436 U.S. 927 (1978); *Anderson v. George*, 233 S.E.2d 407, 410 (W. Va. 1977).<sup>20</sup> And the primary reason for statutes banning cruelty to

<sup>20</sup> Indeed, all fifty states have laws protecting animals. See Ala. Code § 13A-11-14 (1982); Alaska Stat. § 11.61.140 (1989); Ariz. Rev. Stat. Ann. § 13-2910 (1956); Ark. Code Ann. § 5-62-101 (Michie 1987); Cal. Penal Code § 597 (West Supp. 1992); Colo. Rev. Stat. § 18-9-202 (1986 & Supp. 1991); Conn. Gen. Stat. § 53-247 (Supp. 1992); Del. Code Ann. tit. 11, § 1325 (1974 & Supp. 1990); D.C. Code Ann. § 22-801 & 802 (1981); Fla. Stat. ch. 828.12 (1976); Ga. Code Ann. § 16-12-4 (Michie 1988); Haw. Rev. Stat. § 711-1109 (Supp. 1991); Idaho Code § 18-2102 (1987); Ill. Ann. Stat. ch. 8, para. 703.01 (Smith-Hurd Supp. 1992); Ind. Code Ann. § 35-46-3-12 (Supp. 1991); Iowa Code Ann. § 717.2 (Supp. 1992); Kan. Stat. Ann. § 21-4310 (Supp. 1992); Ky. Rev. Stat. Ann. § 525.130 (1990); La. Rev. Stat. Ann. § 14:102 (West 1986 & Supp. 1992); Me. Rev. Stat. Ann. tit 7, § 4011 (West 1964); Md. Code Ann. § 27:59 (1992); Mass. Gen. L. ch. 272, § 77 (1990); Mich. Comp. Laws § 752.21 (1991); Minn. Stat. § 343.21 (1990); Miss. Code Ann. § 97-41-1 (1972); Mo. Ann. Stat. § 578.012 (Vernon Supp. 1992); Mont. Code Ann. § 45-8-211 (1991); Neb. Rev. Stat. § 28-1002 (1989); Nev. Rev. Stat. Ann. § 574.100 (Michie Supp. 1991); N.H. Rev. Stat. Ann. § 644:8 (1986 & Supp. 1991); N.J. Stat. Ann. § 4:22-26 (West Supp. 1991); N.M. Stat. Ann. § 30-18-1 (Michie 1978); N.Y. Agric. & Mkts. Law § 353 (McKinney 1991); N.C. Gen. Stat. § 14-360 (Supp. 1991); N.D. Cent. Code § 36-21.1-02 (1987 & Supp. 1989); Ohio Rev. Code Ann. § 959.13 (Anderson 1988); Okla. Stat. Ann. tit. 21, § 1685 (West 1983); Or. Rev. Stat. § 167.315-.330 (1991); 18 Pa. Cons. Stat. Ann. § 5511 (Supp. 1992); R.I. Gen. Laws § 4-1-2 & 3 (1987); S.C. Code Ann. § 47-1-40 (Law. Co-op. Supp. 1991); S.D. Codified Laws Ann. § 40-1-2 (1985); Tenn. Code Ann. § 39-14-202 (1991); Tex. Penal Code Ann. § 42.11 (West 1989 & Supp. 1992); Utah Code Ann. § 76-9-301 (Supp.

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animals — the protection of public morals — highlights the importance of yet another of Hialeah's interests, *i.e.*, shielding children from scenes of cruelty. *See Higgins*, 178 N.E. at 538 (“[statute] directed against acts which may be thought to have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe”); *Bland*, 76 P. at 361 (“seeing frequently the mutilated and disfigured animals sears the conscience and hardens the minds of the people”); *Johnson*, 30 App. D.C. at 522 (“Cruel treatment of helpless animals . . . arouses the . . . indignation of every person possessed of human instincts”); *C.E. America, Inc.*, 210 So.2d at 446 (observing bloody bulls “shocks the sensibilities of any person possessed of humane instincts”); *Stephens v. State*, 3 So. 458, 459 (Miss. 1888) (“cruelty to [animals] manifests a vicious and degraded nature, and it tends inevitably to cruelty to men”); *Schoenbusch*, 8 S.W. at 792 (stating that prevention of cruelty to animals is for protection of general welfare); *Prince*, 94 A. at 966 (noting that cruelty to animal statute “calculated to prevent a prevalent evil and to promote the welfare of society”); *Barrett*, 116 N.E. at 101 (protecting animals guards moral and spiritual needs of citizens); *State v. Porter*, 16 S.E. 915, 916 (N.C. 1893) (“[statute] enacted to protect the public morals, which the commission of cruel and barbarous acts tends to corrupt”); *Kuchler*, 100 P. at 922 (regulating slaughter relates to public morals); *Peck*, 574 P.2d at 369 (legislating against animal fighting

<sup>20</sup>(...continued from preceeding page)

1991); Vt. St. Ann., tit. 13, § 352 (Supp. 1991); Va. Code Ann. § 3.1-796.122 (Michie Supp. 1991); Wash. Rev. Code Ann. § 16.52.070 (West 1992); W. Va. Code § 61-8-19 (Supp. 1991); Wis. Stat. Ann. § 951.02 (West Supp. 1991); Wyo. Stat. § 6-3-203 (1977). The following states, like Florida and Hialeah, forbid the “unnecessary,” “needless,” “unjustifiable” or “undue” suffering of animals: California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

“is justified for the purpose of regulating morals”); *see also Prince*, 321 U.S. at 166 (The state’s “authority is not nullified merely because the parent grounds his claim to control the child’s course of conduct on religion or conscience”); *Jehovah’s Witnesses*, 390 U.S. at 598. Finally, Hialeah’s interest in protecting its citizens from disease-fostering animal carcasses need only be stated to establish its importance. *Cf. Prince*, 321 U.S. at 166-67 (“The right to practice religion freely does not include liberty to expose the community . . . to communicable disease”).

The *legitimacy* of Hialeah’s interests is established in several ways. First, the interests are legitimate in the sense that they are *actually present* in this case; on the basis of wholly credible expert testimony the district court found this *as a matter of fact, and the court of appeals affirmed this finding. Cf. Tony & Susan Alamo Found.*, 471 U.S. at 299 (factual questions resolved against petitioners by both courts below are barred from review in this Court absent the most exceptional circumstances).<sup>21</sup> The interests are also legitimate in that making an exception for the petitioners (who aver that they will dispose of carcasses in a hygienic fashion) would abuse the cruelty-to-animals and protection-of-children interests, and would undoubtedly raise charges of favoritism from the many other sects in the area that practice exposed animal sacrifice. (A47) *Cf. O’Lone*, 482 U.S. at 353; *Goldman*, 475 U.S. at 512-13 (STEVENS, J., concurring); *Lee*, 455 U.S. at 263 n.2 (STEVENS, J., concurring).<sup>22</sup> Finally, the ordinances are legitimate

<sup>21</sup> While not relying on them, the court of appeals left undisturbed the district court’s findings of fact regarding the adverse psychological effects upon children of witnessing animal carnage.

Interestingly, even petitioners admitted at trial that the health risks associated with the “putrefactive decomposition” (R364) of exposed animal sacrifices were “a legitimate concern.” (T41)

<sup>22</sup> The appearance of favoritism also presents yet another reason for abandoning the compelling state interest test in Free Exercise *action* cases. For given the nature of things, no one thinks that government is favoring  
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because they were not passed with "an intent to discriminate against particular religious beliefs or against religion in general." See *Bowen*, 476 U.S. at 707. The district court found as a matter of fact (which the court of appeals affirmed), that when Hialeah passed the ordinances it did not have an intent to suppress Santeria, though it did want to stop animal sacrifice by whomsoever it was practiced. (A28) This finding was amply demonstrated by the record, most tellingly, however, by the fact that Hialeah granted petitioners a certificate of occupancy, permitting them to open their doors and operate as a church — all they could not do was sacrifice animals. See also Kimberly C. Moore, *Supreme Court to Hear Florida Animal Sacrifice Case*, States News Service, Mar. 23, 1992, available in LEXIS, Nexis Library, Omni File ("We don't have a problem with anyone's religion," said Julio Martinez, the mayor of Hialeah and also a proponent of outlawing the animal sacrifices. 'Animal Sacrifices don't belong in this country in this century'); A.J. Dickerson, *Secretive Religion Makes Waves in South Florida*, AP, June 7, 1987, available in LEXIS, Nexis Library, Omni File ("People oppose it absolutely," said Councilman Salvatore D'Angelo. 'I respect all religions but I am opposed to the ritual of live animal sacrifice').<sup>23</sup> Cf. *Barnes*

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<sup>22</sup>(...continued from preceeding page)

particular religious sects when it countenances the mere profession and propagation of those beliefs. But when government stands idly by as persons act in and upon the real world in the name of religion, permitting behavior that the enlightened sensibilities of society have long and rightly viewed as antisocial, the impression inevitably arises that government is favoring one group at the expense of all others.

<sup>23</sup> Petitioners make much of the "mob" atmosphere at the city council meeting during the time that the ordinances were passed. It is interesting to note at what point, however, the crowd got truly mob-like: "About 300 people turned out at a council meeting June 9 demanding that the city [of Hialeah] stop the opening of south Florida's first Santeria church," *Butterworth to Decide on Santeria Animal Sacrifice*, UPI, June 15, 1987, available in LEXIS, Nexis Library, UPI File (emphasis added) — "[the] (continued on next page...)"

v. *Glen Theatre, Inc.*, 111 S. Ct. 2456, 2463 (1991) (state intended to suppress public nudity, not erotic expression); *United States v. O'Brien*, 391 U.S. 367 (1968) (government intended to suppress destruction of draft cards, not expressive burning of them).

Which raises yet another, final, interest of Hialeah, one that is obviously legitimate and important. Having had the surrounding area for some time dotted with the remains of animals in streets, parks, and cemeteries,<sup>24</sup> the announcement of the church's imminent opening placed the subject of animal sacrifice squarely before the city council and it rightly recoiled in disgust. Not because it disagreed with the teachings of Santeria, or with what its adherents believed. These it was quite prepared to have disseminated throughout Hialeah via the church, viewing them, apparently, as perhaps odious but nonetheless harmless ignorance. No, the City Council of Hialeah recoiled in disgust at, and acted affirmatively to prevent, *animal sacrifice* because it is, in a word,

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<sup>23</sup>(...continued from preceeding page)

furios crowd booed, hissed and jeered city attorneys who told City Council it could not legally stop a religion that sacrifices animals from opening its first public church in Florida," A.J. Dickerson, *Lawyers Jeered for Their Advice on Closing Church*, AP, June 10, 1987, available in LEXIS, Nexis Library, AP File (emphasis added). Thus, despite strong political pressure to the contrary, the City Council of Hialeah bowed to its constitutional obligations, and permitted the church to open. This is the political process in action, the principal means by which minority religions may be protected. See *Smith II*, 494 U.S. at 890.

<sup>24</sup> See Jeffrey Schamlz, *Hialeah Journal; Animal Sacrifices: Faith Or Cruelty?*, N.Y. Times, Aug. 17, 1989, at A16; A.J. Dickerson, *Secretive Religion Makes Waves In South Florida*, AP, June 7, 1987, available in LEXIS, Nexis Library, Omni File ("They drop it over the fence or they leave it on a grave. Every day we send an employee to clean up. We throw away the dead animals," said Fred Cruz, a sales manager at Graceland Memorial Park").

*barbaric*, and is, as a secular matter, deemed to be immoral.<sup>25</sup> On several occasions this Court has declared that government may legislate against a return to barbarism. In *Mormon Church*, noting that "[t]he organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism," 136 U.S. at 49, the Court held that "[t]he State has a perfect right to prohibit polygamy, and all other open offences against the enlightened sentiment of mankind, notwithstanding the pretence of religious conviction by which they may be advocated and practised," *id.* at 50. And in *Cleveland*, after quoting *Mormon Church*, see *Cleveland*, 329 U.S. at 19, the Court wrote that "[w]hether an act is immoral within the meaning of the statute, is not to be determined by the accused's concepts of morality." *Id.* at 20. Thus, while the enlightened sensibilities of our society unanimously and rightly condemn the *unnecessary* killing of animals, *amici* recognize that, regrettably, in this culture it is generally accepted that *the* primary purpose for the animals which petitioners wish to sacrifice is to provide food for the sustenance of humankind. It was, therefore, well within the bounds of civilized judgment for Hialeah to make the *secular* determination that the killing of these animals *not* for the primary purpose of consumption is "unnecessary" and thus immoral. Because we are civilized we must permit the profession and propagation of any belief whatsoever; but we are not yet so "civilized" that barbarism must be countenanced, irrespective of the reason advanced for its practice.

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<sup>25</sup> And make no mistake: for though this case *does* involve a clash of cultures, it does *not* present a "white" *versus* "black" or "white" *versus* "brown" scenario. Hialeah has a population of approximately 174,000 — 86% of which is Hispanic. D&B Donnelly Demographics, July 29, 1992, available in DIALOG, File No. 575. Cuban emigres and their progeny, then, are hardly outnumbered in Hialeah. Indeed, at the time the instant ordinances were enacted, the City of Hialeah was governed by its mayor, Raul L. Martinez, and city counsel members Cardoso, D'Angelo, Ehevarria, J. Martinez, Mejides, and Robinson. What this case *does* present, however, is the struggle of Western Civilization *versus* . . . something else.

## CONCLUSION

The day is passed when America could be parochially described as strictly a "Christian Nation." It may be, moreover, that we are no longer strictly even a "religious" people — at least not in the traditional sense of established faith. But the United States is — still, at least — a Western nation, one that proceeds from the very best that Western Civilization has to offer, including limited government, due process, trial by jury, and, most assuredly, religious tolerance. Regarding the latter, government must therefore be utterly tolerant of religious beliefs and the peaceable profession and propagation of such beliefs, no matter how barbaric or misguided those beliefs may seem to any number of people. This is the "marketplace of ideas," religious and otherwise. But in this free yet civilized society of ours, neither the federal government, nor the states, nor the City of Hialeah is required to tolerate rampant primitivism in the name of religion. For while governments may choose to accommodate, nevertheless they may also choose to forbid non-expressive religious *action* when it is contrary to important and legitimate interests within their spheres of power. The prevention of cruelty to animals, the preservation of children from the dulling of their humane sensibilities through witness to carnage, the protection of the citizenry from disease-fostering rotting carrion, and the securing of society against a return to barbarism — all are governmental interests of high and time-honored importance, and all are genuinely present in this case. Because of this, and because the City of Hialeah, Florida, acted to safeguard these interests without

discriminatory intent, the judgment of the court of appeals, upholding that of the district court, should be affirmed.

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